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lates, the questions are stated in general terms, rather than in the factual framework of any of the cases:

1. Whether an arrested suspect's lack of the assistance of counsel at the time he makes a pre-arraignment statement renders the statement constitutionally inadmissible at his trial.[1]

2. Whether rules presently or hereafter established within the ambit of the first question should be retroactively applied.

Summary of Argument

I

We oppose the establishment of new constitutional restrictions on the admissibility of pre-arraignment statements made in the absence of counsel. Neither the literal text nor the originally intended meaning of the "Assistance of Counsel" clause of the Sixth Amendment comprehend pre-adjudicatory stages of criminal procedure. Extension of the clause to pre-arraignment proceedings must therefore depend on a showing that such extension is required by developing concepts of fairness beyond the ambit of the original understanding. In fact, no such showing has been made. Therefore the holding of *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), should not be made the basis for a general exclusionary rule of constitutional dimension.

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[1] The five cases present this question under varying attendant circumstances. See note 2, *infra*, page 11. As used in this brief, the term "arraignment" refers to the individual's first appearance before a judicial officer subsequent to his arrest. New York law requires that the magistrate before whom the individual is brought inform him at this time, and before any further proceedings are had, of his right to the assistance of counsel; and that, if he desires counsel but is financially unable to obtain counsel, then counsel will be assigned. See N. Y. Laws of 1965, c. 878, amending N. Y. Code Cr. Proc. §§ 188, 190 and 699.

This Court has repeatedly recognized the importance of pre-arraignment interrogation in the law enforcement process. See, *e.g. Haynes* v. *Washington*, 373 U. S. 503, 515 (1963). Empirical evidence now in hand affords no basis for challenging this evaluation. The Court has also recognized the hindrances which would be caused by a general requirement of counsel at the pre-arraignment stage. *Cicenia* v. *LaGay*, 357 U. S. 504, 509-511 (1958). Adoption of the exclusionary rules urged by defendants in these cases would result either in the virtual elimination of pre-arraignment interrogation, or the large scale installation of defense counsel at police stations, or both of these consequences in unpredictable proportions. Empirical evidence justifying such consequences is lacking, and neither professional nor general public concepts of fairness warrant a constitutional requirement of such fundamental changes in pre-arraignment procedures.

Procedural development in this area should take place in non-constitutional terms. State courts and legislatures, and professional organizations such as the American Law Institute, are currently and closely concerned with pre-arraignment procedures, and are alert to the need for mitigating the legal disadvantages of the indigent and uneducated. Progress toward this end, with due regard for the needs of law enforcement, will be surer with the effective participation of these agencies.

II

To whatever extent new exclusionary rules may be established in these cases or may be deemed already established by *Escobedo* v. *Illinois, supra*, such rules should not be given retroactive application. The same considerations which militated against retroactive application of newly established rules barring the admission of illegally seized evidence (*Linkletter* v. *Walker*, 381 U. S. 618 [1964]) and prohibiting adverse comment by a trial judge upon a defendant's failure to testify at a criminal trial (*Tehan* v.

Shott, —— U. S. ——, 34 U.S.L. Week 4095 [1965]) weigh heavily against retroactive application of any new rule limiting the admissibility of pre-trial statements which are not shown to have been involuntary.

There can be no doubt but that, at least prior to the decision in *Escobedo* v. *Illinois*, there was considerable and justifiable reliance by the state judicial systems upon this Court's earlier decisions establishing voluntariness as the criterion governing admissibility of a defendant's inculpatory pre-trial statement. See, *e.g.*, *Crooker* v. *California*, 357 U. S. 433 (1958). For this Court to apply a new exclusionary rule retroactively, without regard to the voluntariness of challenged statements, would be to hold that state courts and prosecutors should not have used evidence which this Court had previously told them was admissible.

The primary purpose of any new exclusionary rule limiting the admissibility of pre-trial statements would undoubtedly be to prevent police coercion and ensure that an individual's privilege against self-incrimination remains meaningful. Retroactive application would not further this purpose, however—to the extent that an exclusionary rule is an effective deterrent to police misconduct, it is because the police, after the establishment of such a rule, may be expected to act with knowledge of its sanctions. Nor would the policy of protecting the innocent be furthered by retroactive application—to the extent that the absence of counsel may have contributed to the making of an involuntary and hence possibly unreliable statement, relief is already available. See *Reck* v. *Pate*, 367 U. S. 443 (1961); *Fay* v. *Noia*, 372 U. S. 391 (1963). Judicial integrity would be diminished by such an application, since the precedental value of court decisions would be seriously undermined. Retroactive application of new exclusionary rules would not be conducive to the orderly administration of criminal justice either. Numerous old convictions would be reopened and persons convicted of serious crimes, on

reliable evidence of their guilt, would be the principal beneficiaries.

Retroactivity would also be likely to impose serious restraints upon the progressive development of new rules by the state courts. Surely one important reason why some state courts have felt free to establish new exclusionary rules has been their reasonable expectation that the new rules would not affect past cases in which convictions have become final. In addition, retroactive application would impose serious strains on the resources of the bench and bar in all the states, to the detriment of those individuals who have more deserving claims for post-conviction relief and to the detriment of the social interest in meeting pressing problems in other areas of criminal law.

Argument

The first of the two questions to which this brief is primarily addressed is raised in various forms and factual settings in all five of the instant cases, and the second question in No. 762, *Johnson and Cassidy* v. *New Jersey*. Although they are disparate in important respects, the two questions are closely interlocked, in that the reasoning and conclusions adopted for the first may well affect if not govern the answer to the second.

A basic part of our position on both of these questions is the proposition that the constitutional claims asserted in these cases are part of a developmental process rather than an "original understanding".[1] Accordingly, we be-

[1] Compare the conflicting approaches to the "original understanding" of the Fourteenth Amendment in Mr. Justice Black's dissenting opinion in *Adamson* v. *California*, 332 U. S. 46, 68-123 (1947), and Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights: The Original Understanding*, 2 Stan. L. Rev. 5 (1949). Assuming (in line with Mr. Justice Black's position) "total incorporation" of the Sixth Amendment in the Fourteenth, we think it clear (*infra*, pp. 15-17) that the original understanding of the "Assistance of Counsel" clause did not comprehend the claims asserted here.

lieve that the Court may and urge that it should take full account of contemporary factors in determining whether, when, and how much to expand the constitutional dimension of the right to counsel in the pre-arraignment stage of a proceeding. Our assessment of these factors comprises the main body of this brief.

I

The Court should not presently enlarge the constitutional dimension of pre-arraignment rights to the assistance of counsel.

The constitutional test to be applied in determining the admissibility of confessions was restated by this Court, speaking through Mr. Justice Goldberg, in *Haynes* v. *Washington,* 373 U. S. 503, 513:

> " '[T]he question in each case is whether the defendant's will was overborne at the time he confessed' *Lynum* v. *Illinois,* 372 U. S. 528, 534. 'In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort.' *Wilson* v. *United States,* 162 U. S. 613, 623. See also *Bram* v. *United States,* 168 U. S. 532. And, of course, whether the confession was obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances."

The application of this test resulted in reversal of the conviction in the *Haynes* case upon the Court's conclusion that the interrogation of the petitioner while under detention for sixteen hours, the denial of his requests for counsel, and the refusal of the police to permit petitioner to telephone his wife until he signed a confession, demonstrated the involuntariness of the confession.[1]

[1] Other recent instances in which this Court has set aside convictions upon determining that the confessions in question did not meet the test of "voluntariness" include *Lynumn* v. *Illinois,* 372 U. S. 528 (1963); *Culombe* v. *Connecticut,* 367 U. S. 568 (1961); *Reck* v. *Pate,* 367 U. S. 433 (1961); *Blackburn* v. *Alabama,* 361 U. S. 199 (1960); and *Spano* v. *New York,* 360 U. S. 315 (1959).

The following year in *Escobedo* v. *Illinois*, 378 U. S. 478, this Court considered the admissibility of a pre-arraignment statement in the context of the Sixth Amendment guarantee of the right to "the assistance of counsel".[1] The scope of that decision has been the subject of numerous and conflicting decisions in both State and Federal courts[2] and extensive discussions in legal periodicals.[3]

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[1] To whatever extent that case is deemed to establish a "new" rule concerning the admissibility of confessions, a problem of retroactivity is raised, which is discussed in Point II of this brief.

[2] See, *e.g.*, *State* v. *Miranda*, 98 Ariz. 18, 401 P. 2d 721 (1965), *cert. granted*, 86 Sup. Ct. 320; *Commonwealth ex rel. Linde* v. *Maroney*, 416 Pa. 331, 206 A. 2d 288 (1965); *State* v. *Worley*, 178 Neb. 232, 132 N. W. 2d 764 (1965); *Bean* v. *State*, 398 P. 2d 251 (Nev. 1965); *People* v. *Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964), *cert. denied*, 380 U. S. 961; *Anderson* v. *State*, 237 Md. 45, 205 A. 2d 281, 285 (1964); *State* v. *Smith*, 43 N. J. 67, 202 A. 2d 669, 678 (1964), *cert. denied*, 379 U. S. 1005; *Browne* v. *State*, 24 Wis. 2d 491, 131 N. W. 2d 169 (1964), *cert. denied*, 379 U. S. 1004; *State* v. *Fox*, 131 N. W. 2d 684 (Iowa 1964); *Galarza Cruz* v. *Delgado*, 233 F. Supp. 944 (D.P.R. 1964); *State* v. *Dufour*, 206 A. 2d 82 (R. I. 1965); *State* v. *Neely*, 239 Ore. 487, 398 P. 2d 482 (1965); *Commonwealth* v. *Negri*, 213 A. 2d 670, 672 (Pa. 1965); *Commonwealth* v. *McCarthy*, 200 N. E. 2d 264 (Mass. 1964); *Campbell* v. *State*, 384 S. W. 2d 4 (Tenn. 1964); *United States* v. *Cone*, —— F. 2d —— (2d Cir., dec'd Nov. 22, 1965, slip op. p. 3391); *United States* v. *Drummond*, —— F. 2d —— (2d Cir., dec'd Dec. 2, 1965, slip op. p. 3225); *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (3d Cir. 1965); *United States ex rel. Davis* v. *North Carolina*, 339 F. 2d 770 (4th Cir. 1965), *cert. granted*, 86 S. Ct. 438 (1965); *Collins* v. *Beto*, 348 F. 2d 823 (5th Cir. 1965); *United States ex rel. Walden* v. *Pate*, 350 F. 2d 240 (7th Cir. 1965); *Jackson* v. *United States*, 337 F. 2d 136 (D. C. Cir. 1964).

[3] See, *e.g.*, Enker & Elsen, *Counsel for the Suspect: Massiah* v. *United States and Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47 (1964); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929 (1965); Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure in* CRIMINAL JUSTICE IN OUR TIME (U. Va. Press 1965); Vorenberg, *Police Detention and Interrogation of Uncounselled Suspects: The Supreme Court and the States*, 44 Boston Univ. L. Rev. 423 (1964); Dowling, *Escobedo and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure*, 56 Journal of Criminal Law, Criminology and Police Science 156 (1965).

Whatever may in other respects be the verdict of judicial history, we think that *Escobedo,* and other recent decisions of this Court in the field of criminal procedure, have had a beneficial effect insofar as they have awakened the interest and concern of bench and bar, legislators and executive officials, police and social welfare agencies to current and crucial problems of criminal law enforcement. In the forefront of those whose concern has taken the form of organized study and the formulation of practical proposals are the American Bar Association, the American Law Institute, and the New York Commission on Revision of the Penal Law and Code of Criminal Procedure.

Because the defendant in the *Escobedo* case had already retained a lawyer and had requested opportunity for consultation which the police had denied him, prior to his confession, the case is susceptible of narrow interpretation. Indeed, this Court's own statement of the holding is very particularly worded (378 U. S. at 490):

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon* v. *Wainwright,* 372 U. S., at 342, 83 S. Ct., at 795, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

We do not suggest that the *Escobedo* case be robbed of principled basis and practical effect by an overly meticulous insistence on its details. But we do read its holding, quoted above, as a warning that substantial variation in circumstances will require fresh consideration of the consequences. And we urge, for the reasons herein set forth, that the present cases should not be the occasion for any substantial expansion of its impact in the constitutional dimension.

These five cases (as well as a sixth to be heard later this term[1]) present a spectrum of questions closely related to those dealt with in the *Escobedo* case. As already indicated, it is not our purpose to seek either affirmance or reversal of any of these cases, for the reason that all five of them involve issues in addition to those of present interest to the *amici curiae*,[2] which may be determinative of their several outcomes.

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[1] *Davis* v. *North Carolina*, 339 F. 2d 770 (4th Cir. 1965), *cert. granted*, —— U. S. ——, 86 S. Ct. 438 (Dec. 13, 1965), transferred to appellate docket as No. 815, Oct. Term, 1965 (34 U.S.L. Week 3223).

[2] Thus No. 760, *Vignera* v. *New York*, involves a twenty-four hour period of detention prior to arraignment, from which petitioner projects arguments primarily derived from *McNabb* v. *United States*, 318 U. S. 332, and *Mallory* v. *United States*, 354 U. S. 449.

No. 761, *Westover* v. *United States*, likewise involves *McNabb-Mallory* questions, and furthermore is a federal court case, so that statutory and "supervisory" as well as constitutional factors are present. Other unrelated questions (evidentiary and procedural) are also raised.

In No. 762, *Johnson and Cassidy* v. *New Jersey*, petitioners have raised questions pertaining to self-incrimination through comment to the jury, severance, and improper prosecution argument and summation.

In No. 584, *California* v. *Stewart*, and No. 759, *Miranda* v. *Arizona*, in addition to the issues pertaining to the assistance of counsel, there are questions concerning the absence or adequacy of the warning given to the accused that he had a right to remain silent; these questions are likewise present in the *Vignera* case.

Rather, we wish to lay before the Court various considerations bearing on the role of *constitutional* decision-making in this complicated and contentious area. The inclusion in this group of cases of one (No. 761, *Westover* v. *United States*) from the federal judicial system underlines the distinction which, familiar though it may be, merits emphatic reiteration at this time. For in the *Westover* case (assuming that the unrelated evidentiary and procedural questions are not determinative) this Court must take account of federal statutory policy and its own responsibilities for supervision of the federal judicial process, and may find it wise to enunciate general federal rules derived from these sources.

In the other four cases, the Court should, we respectfully submit, give heed both to the limitations of the federal constitutional source and to the enduring impact and comparative inflexibility of constitutional decision-making. Accordingly, in the ensuing text, we invite the Court's attention to the historical content of the "Assistance of Counsel" clause; to the alarming paucity (soon, we hope, to be mitigated) of empirical data pertaining to the role of pre-arraignment interrogation in law enforcement and the probable effect of a general requirement that counsel be present at such interrogation; to the difficulties which courts and bar would encounter in meeting drastic new requirements of universal application; and to the importance of effective participation in the solution of these questions by legislative bodies, professional associations, and other official and private agencies importantly concerned.

A. Elements of the constitutional issue

The manner and extent to which the provisions of the Bill of Rights are "incorporated in" and made applicable to the States by the Fourteenth Amendment remains a matter of dispute within the Court.[1] In our approach to the

issues of these cases we assume, *arguendo,* that the Sixth Amendment guarantee of the right to the assistance of counsel applies in the same manner and with the same force to the States as to the Federal government, i.e., that in constitutional terms the right to counsel is the same under the Sixth and Fourteenth Amendments.[2] So regarded, some of the constitutional issues presented by these petitioners appear to be:

(a) At what point after the initial contact between a police officer and an individual in which the individual's knowledge of or connection with an actual or suspected crime is discussed does the individual have a constitutional right to the assistance of counsel?

(b) When the right described in (a) arises does the individual have a simultaneous or subsequent constitutional right to be effectively informed of a right to counsel?

(c) When the rights described in (a) and (b) have arisen and if the individual is unable, for financial or other reasons, to obtain counsel for himself, are the arresting authorities, either then or subsequently, constitutionally obligated to provide him with counsel?[3]

(d) Are statements made by an individual, at a time when his rights under (a), (b) or (c) have been violated, constitutionally inadmissible?

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[1] See the concurring opinion of Mr. Justice Harlan in *Ker* v. *California,* 374 U. S. 23, 44-45 (1963), and his dissenting opinion in *Griswold* v. *Connecticut,* 381 U. S. 479, 500. *Cf.* Mr. Justice Stewart's remark in *Massiah* v. *United States,* 377 U. S 201, 205: "Here we deal not with a state court conviction but with a federal case, to which the specific guaranty of the Sixth Amendment directly applies.

[2] There may, of course, be additional standards drawn from statutes or from this Court's judicial supervisory powers.

[3] It would appear to be established that the right to retain one's own counsel is at least somewhat more extensive than the right to have counsel supplied. *Chandler* v. *Fretag,* 348 U. S. 3, 9 (1954).

assure equal treatment for rich and poor. Granted that the protection of these rights is of the utmost importance, the fact remains that other values must also be weighed. The dimensions of the problem were described by Mr. Justice Jackson in his concurring opinion in *Watts* v. *Indiana*, 338 U. S. 49, 57 (1949) at 61-62:

> "I suppose no one would doubt that our Constitution and Bill of Rights, grounded in revolt against the arbitrary measures of George III and in the philosophy of the French Revolution, represent the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself. They were so intended and should be so interpreted. It cannot be denied that, even if construed as these provisions traditionally have been, they contain an aggregate of restrictions which seriously limit the power of society to solve such crimes as confront us in these cases. Those restrictions we should not for that reason cast aside, but that is good reason for indulging in no unnecessary expansion of them.
>
> I doubt very much if they require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested. Is it a necessary price to pay for the fairness which we know as 'due process of law'? And if not a necessary one, should it be demanded by this Court? I do not know the ultimate answer to these questions; but, for the present, I should not increase the handicap on society."

C. The materials of decision

We have stressed the past, not because it provides the answers to the issues raised in these cases, but because it reveals a process and suggests an approach. As the peti-

tioner in *Miranda* rightly stresses, the constitutional right to the assistance of counsel has grown with the years and the times.

In short, the Court can not resolve these issues by seeking the original intention of those who framed the Bill of Rights or by verbal exegesis of the "Assistance of Counsel" clause, and must therefore find the primary material for decision in its appreciation of contemporary standards and circumstances. The temporal flexibility of general constitutional standards was remarked by Mr. Justice McKenna as early as 1910 in *Weems* v. *United States*, 217 U. S. 349, 373:

> "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions."

Commenting on this passage nearly half a century later, Chief Justice Warren, in *Trop* v. *Dulles*, 356 U. S. 86 (1958), wrote (at 100-101):

> "The Court recognized in that [the *Weems*] case that the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of maturing society."

These considerations apply to the Due Process Clause of the Fourteenth Amendment quite as much as to the Eighth Amendment[1] and their present import, we think, is both plain and of great moment. Since the Court is not here bound by history or verbal logic, the constitutional

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[1] At a later point in his opinion in the *Weems* case, Mr. Justice McKenna applied these generalizations directly to the Fourteenth Amendment (217 U. S. at 374).

standard may be applied with great flexibility, giving full weight to the bearing of contemporary empirical evidence of the need for and probable effect of the changes here sought.

These changes are not uniformly outlined, but in all these cases the defendants seek the establishment of a rule, to become effective at some point during pre-arraignment interrogation, at which the arrestee must either waive, obtain, or be provided with counsel, on pain of exclusion from evidence of any statement made in the absence of counsel. In No. 761 (*Westover*, Br. p. 34), petitioner would draw that line at the moment of custody; in No. 759 (*Miranda*, Br. p. 30), when interrogation begins; in No. 760 (*Vignera*, Br., pp. 10, 37-38) when the "accusatory" stage has been reached.

Under any of these proposals, it seems clear that the consequences would be:

(a) great reduction or virtual elimination of pre-arraignment interrogation of arrestees; or

(b) provision of counsel on a vast scale for arrestees, most of whom are indigent; or

(c) both (a) and (b) in varying degrees and unpredictable ratios.

We do not suggest that the statement of these consequences establishes them as undesirable. But we do suggest that they are of such a nature that further empirical investigation and analysis are necessary as a basis for general rule-making whether judicial or legislative. As was stated by Mr. Justice Black, dissenting in *Jackson* v. *Denno*, 378 U. S. 368 (1964) at 403 (commenting on the rule there adopted by the Court in line with the suggestions of commentators):

"None of these commentators appears to have gathered factual data to support his thesis, nor does it

appear that their arguments are at all rooted in the actual trial of criminal cases. Theoretical contemplation is a highly valuable means of moving toward improved techniques in many fields, but it cannot wholly displace the knowledge that comes from the hard facts of everyday experience."

D. Available empirical evidence is insufficient for projecting and evaluating the consequences of adopting the exclusionary rules proposed in these cases

The constitutional requirements of fair criminal procedure newly enunciated by this Court in recent years have had their origin by statute or judicial decision in the several states. This Court has, to be sure, given these rules general application by making them of constitutional dimension, but it has not originated the substance of the rules themselves. For example, at the time of *Mapp* v. *Ohio*, 367 U. S. 643 (1963), well over a third of the states had already adopted the exclusionary rule for evidence obtained by unlawful means, and the trend was heavily in that direction.[1] At the time of *Gideon* v. *Wainwright*, *supra*, all but thirteen states had statutes requiring that counsel be provided at trial for the defense of indigent defendants in all felony cases, and in eight of those juris-

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[1] The rule barring the use at trial of evidence obtained by unreasonable search and seizure was first introduced into American jurisprudence in the State of Iowa (*State* v. *Sheridan*, 96 N. W. 730 [Ia. 1903]), several years before the Court applied the rule to federal courts in *Weeks* v. *United States*, 232 U. S. 283 (1914). After *Weeks*, although Iowa abandoned the rule, eighteen states had voluntarily adopted it by 1949 (see appendix in *Wolf* v. *Colorado*, 338 U. S. 25, 33-39). By 1960, with several states having adopted the rule subsequent to *Wolf*, the Court observed that "the movement towards exclusion has been halting but seemingly inexorable" (*Elkins* v. *United States*, 364 U. S. 206 at 219). In holding the rule applicable to the states in 1961, the Court referred directly to the experience of the states, particularly that of California (*Mapp* v. *Ohio*, 367 U. S. 643 at 650-653).

dictions counsel was in fact provided in felony cases.[1] At the time of *Griffin* v. *California*, 380 U. S. 609 (1965), all but six states barred comment upon a defendant's failure to testify at trial.[2]

In all these situations, accordingly, the probable consequences of the new constitutional rule were not a matter of speculation, for the rules were already in force on a non-constitutional basis in a large number of jurisdictions. This does not, of course, mean that debate over the merits of these rules had been stilled or that evaluation of their consequences was uniform. It was, however, clear prior to the constitutional decisions rendered in this Court that the substantive rules they embodied had already proved not only tolerable but preferable to their alternatives in many or most of the states, and the practical workings of the rules could thus be observed in the laboratories which the state and local systems furnished.

But such is not the case with the exclusionary rules proposed in the present cases. Only three states, to our knowledge, have adopted rules conditioning the admissibility of pre-arraignment statements on prior warnings to the defendant of his rights to remain silent and to consult counsel, and in these three states the rule is of very recent origin.[3] No state, so far as we know, has as yet established a system for the mandatory and universal provision of counsel for the indigent at the pre-arraignment stage.

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[1] See Brief for Petitioner in *Gideon* v. *Wainwright*, 372 U. S. 335, No. 155 Oct. Term 1962, p. 29; *cf.* Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, *in* CRIMINAL JUSTICE IN OUR TIME, p. 92 n. 262 (U. Va. Press 1965).

[2] See *Tehan* v. *Shott*, —— U. S. ——, 34 U.S.L. Week 4095 at 4098 (January 19, 1966).

[3] See *People* v. *Dorado*, 398 P. 2d 361 (Calif. 1965); *People* v. *Neely*, 398 P. 2d 482 (Oregon 1965); *State* v. *Dufour*, 206 A. 2d 82 (R. I. 1965). In addition, the Pennsylvania Supreme Court has stated (*Commonwealth* v. *Negri*, 213 A. 2d 670, 672 [1965])

(Footnote continued on following page)

Since in these cases, therefore, empirical evidence of the consequences of the proposed rules based on experience from their actual operation is altogether lacking, it would seem especially important to seek evidence from other sources. One would want to know, if only in part, the answer to questions such as the following:

(a) How important is pre-arraignment questioning in the identification and apprehension of those subsequently convicted of crime?

(b) How important are pre-arraignment statements as evidence for the conviction of those accused?

(c) What would be the effect on the interrogation process of (1) previous warning of the right to remain silent; (2) previous informing of the right to assistance of counsel; (3) a requirement that counsel either be waived or be present?

(d) How, in practice, would counsel be made available at the pre-arraignment stage?

This kind of empirical data can, in fact, be obtained, and would be of great value, particularly if studied in relation to available evidence on the effectiveness of alternative means of achieving the same goals. The techniques of the social sciences have already proven to be of considerable assistance in developing a body of usable knowledge in other areas of the law, and in stimulating invaluable reform in those areas. The statistical studies of the Man-

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(Footnote continued from preceding page)
that that state would follow the ruling of the Third Circuit Court of Appeals in *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (1965), where such a warning was held to be required, until further word from this Court. The State of Texas has long provided by statute (Tex. Code Cr. Proc. Art. 727), that a defendant's confession is excludable where he had not previously been warned of his right to remain silent; however, if the confession leads to confirming evidence both these "fruits" and the confession itself are admissible.

hattan Bail Project,[1] for example, have undoubtedly been greatly responsible for awakening the interest of both the bar and the public in thoroughgoing bail reform.[2]

But although empirical data bearing on the questions listed above may be obtainable, it has not as yet been obtained, at least in sufficient quantities to support a presumably enduring constitutional decision of nationwide application. We detail below several of the areas where both present facts and future prospects remain murky.

(1) *The importance of pre-arraignment questioning in law enforcement*

Police and prosecutorial authorities generally regard opportunity for sustained questioning of arrested suspects as essential for the maintenance of tolerable standards of efficiency in the apprehension and conviction of criminals. The validity of this view has been accepted and enunciated in various opinions and at various times by a number of the members of this Court, and on at least two occasions has commanded a majority. *Haynes* v. *Washington*, 373 U. S. 503, 515 (1963); *Crooker* v. *California*, 357 U. S. 433 (1958) at 440-441, in which the opinion of the Court remarks that elimination of police questioning would have a "devastating effect on law enforcement." See also *Cicenia* v. *Lagay*, 357 U. S. 504 at 509 (1958).[3]

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[1] See Ares, Rankin and Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. Rev. 67 (1963); Wald, *Pretrial Detention and Ultimate Freedom*, 39 N.Y.U.L. Rev. 631 (1964); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. Rev. 641 (1964).

[2] See generally *Proceedings and Interim Report of the National Conference on Bail and Criminal Justice* (1965), esp. pp. xiii-xxxii (Interim Report, Apr. 1965) and pp. 6-17 (Address of Chief Justice Warren to the Opening Session of the Conference, May 27, 1964); *cf.* Paulsen, *Pre-Trial Release in the United States*, 66 Col. L. Rev. 109, 116-119, 122-125 (1966).

[3] There are other significant comments on the matter by members of this Court. See, *e.g.*, Mr. Justice Jackson's concurring opinion in *Watts* v. *Indiana*, 338 U. S. 49 (1949) at 58, and Mr. Justice Frankfurter's opinion in *Culombe* v. *Connecticut*, 367 U. S. 568 (1961) at 578-580, with citations to much of the voluminous literature on the question.

The authority of the decisions reached in the *Crooker* and *Cicenia* cases was questioned in *Escobedo* (378 U. S. 492), but not on the basis that the *Crooker* opinion's evaluation of police interrogation was unsound. Indeed, those members of the Court who dissented in the *Crooker* and *Cicenia* cases, and those who comprised the majority in the *Escobedo* case, have not based their conclusions on the premise that police interrogation of suspects is of little value in terms of law enforcement.

This favorable evaluation of police questioning has not gone unchallenged in recent months. Perhaps the most conservative recent estimate as to the value of confessions is that of Judge Nathan Sobel, who finds that confessions are used in less than 10 per cent of the criminal trials in Kings County, New York.[1] Judge Sobel's estimate has been sharply contradicted in several quarters, however, notably by New York County District Attorney Frank Hogan, who has noted that a recent study by his staff indicated that admissions had been made by 62 of 91 defendants in pending homicide cases.[2] Mr. Hogan added that "assistant prosecutors told him that 25 of these, or 27%, could not have been indicted at all if there were no confessions."[3]

Without venturing to pass judgment as between any of these estimates, we suggest that the extent to which confessions are used in evidence is not the only value of police interrogation. Often the questioning furnishes leads to other evidence, and no doubt there are many pre-arraignment admissions and confessions which are not offered at

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[1] N. Y. Law Journal, Nov. 15, 1965, p. 1, col. 6, p. 4, col. 5. Judge Sobel's statistics are based on a survey of the first 1,000 indictments filed in Kings County, New York, subsequent to January 7, 1965. As he acknowledges (*id.* p. 4, col. 5), this is a small sampling; it also gives no hint of the extent to which police questioning may have led to other evidence, or to the immediate release of a suspect.

[2] *N. Y. Herald Tribune*, Dec 2, 1965, p. 31.

[3] *Id.*

the trial because checking their contents led to sufficient independent proof.

Other available statistics indicate that confessions or admissions are made, and used, in quite a high percentage of cases. See, *e.g.*, *Supplementary Memorandum on Behalf of Respondents* in *Linkletter* v. *Walker* and *Angelet* v. *Fay*, Nos. 95 and 581, respectively, Oct. Term 1964 (statistical tables pp. 8-14, summarizing a study of the trial records of the last 100 persons executed for murder in New York prior to 1961, indicate that statements made to the police, after arrest, were introduced in the trials of 85 of those defendants); Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 Calif. L. Rev. 11, 35-44 (1962) (three month study of police performances in two California cities in 1960 showed that between 75 and 90% of all persons charged with crimes had given confessions after what the author terms "surprisingly short" periods of interrogation). The *amicus* brief of the National District Attorneys Association in the present cases presents similar statistics.

Another function of police questioning—perhaps even more important to the effective day to day administration of justice than the solution of a few major crimes—is that of screening cases where an arrest may well have been made upon probable cause but where a decision to charge cannot or should not be made without some further investigation by the police and some evaluation by the prosecutor of the circumstances of the arrest and the availability of admissible evidence. See Bator and Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 Col. L. Rev. 62, 68-70 (1966); LaFave, ARREST, 319-341 (1965). As Professors Bator and Vorenberg have pointed out, the problem of police questioning must be considered in the context of a going system of law enforcement. Bator and Vorenberg, *supra*, at 69. In any large metropolitan area, a great number of persons will be lawfully arrested for a wide

variety of reasons; routine preliminary questioning may well result in their release prior to the filing of any charge, or in the filing of less serious charges. *Id.*, at 69-70, see also Barrett, *supra*, at 31-35.

The California surveys which are the subject of Dean Barrett's study are particularly illuminating in this regard. They indicate that 28.5% of the persons arrested and booked for felonies in California in 1960 were released without the filing of a complaint; in an additional 21.6% of the cases the felony arrests eventually resulted in the filing of misdemeanor complaints. Barrett, *supra*, at 31-35. To the extent that such preliminary screening can be accomplished without subjecting the individual to coercive interrogation—and the available evidence indicates that coercive interrogation is not at all typical of police questioning[1]—it is obviously desirable both in terms of administrative efficiency and in terms of avoiding the unnecessary stigmatization of a person as one who has been charged with crime.

We recognize, of course, that the utility of police interrogation in law enforcement is not the only factor bearing on the issues presented by these cases. But if competing values must be considered, then it is necessary to have as accurate a gauge of their weight as is possible.

On that score, it must be recognized that our present knowledge is far from complete, as the conflicting estimates cited above amply demonstrate. Nevertheless, it is clear

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[1] See, *e.g.*, LaFave, *supra*, at 386, where the author observes that

> "In the great majority of in-custody interrogations observed [in the states of Michigan, Wisconsin and Kansas, in 1956 and 1957], the possibility of coercion appeared slight. In many instances the suspect is merely confronted with the evidence against him or with evidence inconsistent with his prior statements and is asked to give an explanation. Often he is just given an opportunity to admit to other outstanding offenses recited to him. Lengthy, continuous questioning is the exception rather than the rule. In practice the interrogating detective often terminates the questioning after a brief period to appear in court or to check upon statements already given by the suspect."

police may adopt one of two procedures. They may suggest the local public defender or Legal Aid Society and provide access to telephone communication. On the other hand, if the police are unwilling or unable to recommend such counsel, they will simply terminate the interrogation at that point."

Petitioner in *Vignera* does not share the taste of Westover for jails equipped with lawyers; the "automatic assignment of counsel at the station house", he declares (Br. p. 40), would be "an impractical solution and one which the police are ill-equipped to achieve". From this and other passages in the brief, it seems clear that counsel for Vignera is prepared to reckon with frequent terminations of interrogations when the "accusatory" point is reached.

Inasmuch as in the *Escobedo* case an Assistant State's Attorney was called to help frame and to record the confession (378 U. S. at 483), the Court was warranted in describing the process as "accusatory" rather then "investigatory." Yet it seems to us far from clear that the "accusatory-investigatory" comparison in *Escobedo* was intended as a test of general application in future cases, rather than merely as a description of the circumstances in the case at hand. The usefulness of the "accusatory" test has been recently questioned by the Court of Appeals for the Second Circuit, sitting *en banc*, in *United States* v. *Cone*, ——F. 2d —— (Nov. 22, 1965, slip opinion pp. 3391, at 3398-99):

> "It has been suggested that the process of questioning suspects may be dissected into 'investigatory' and 'accusatory' phases and that certain legal conclusions, such as whether the Sixth Amendment's right to counsel 'attaches' and requires that the suspect be advised of his rights to silence and counsel, should flow from a judicial finding that police questioning has passed beyond mere investigation. We do not consider this a realistic doctrine for most cases. It was not the job

of the agents questioning Cone, nor were they qualified to make nice decisions about the sufficiency of the evidence they possessed; nor could they at the time of arrest determine what charges should be formally made and against whom. Agents in hot pursuit of those whom they have reason to believe may be implicated in a crime which has just been discovered cannot be required 'on the spot' to decide difficult questions of the sufficiency and quantum of proof.

We think a judicial inquiry into whether the agents were still in the 'investigatory' stage when they arrested Cone, and whether what had started out as an investigation had reached the 'accusatory' stage when Cone was questioned immediately after his arrest, would serve no useful purpose. What may seem to be sufficient evidence at one stage of an investigation may become quite insufficient when those who have supplied information are themselves accused and become unavailable to the government as witnesses, as happened with Moser and Spencer in this very case. To make judicial assessment of the questioning process turn on whether questioning occurred when a case was no longer in the 'investigatory' stage and had entered the 'accusatory' stage would force police officers to make momentary and critical decisions so unrelated to the actualities of law enforcement that the entire police function might well be significantly undermined or demoralized."

It is true that in several recent decisions the "accusatory-investigatory" language of *Escobedo* has been used as a test.[1] Nevertheless, we share the doubts expressed in the Second Circuit. A typical police investigation may involve

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[1] *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (3d Cir. 1965); *People* v. *Dorado*, 42 Cal. Reptr. 169, 398 P. 2d 361 (1965); *State* v. *Neely*, 239 Ore. 487, 398 P. 2d 482 (1965); *cf. State* v. *Dufour*, 206 A. 2d 87 (R. I. 1965).

the employment of a large number of detectives simultaneously searching for evidence, pursuing different leads, interviewing witnesses and suspects or possible suspects, and checking out alibis. The discovery of a single piece of evidence might focus suspicion on a single individual at any given point in time, yet not justify regarding him as an accused, particularly where there may not be enough evidence even to justify holding him in custody. Even where the case is a routine one, a determination of when an investigation has reached the accusatorial stage involves judgments which cannot easily be made even by courts acting after the fact, much less by a police officer who may be acting in extremely pressing circumstances.

In *United States ex rel. Russo* v. *New Jersey,* 351 F. 2d 429 (3rd Cir. 1965), the Court of Appeals for the Third Circuit, in ruling that the interrogation there involved had reached the "accusatory" stage, gave weight (351 F. 2d at 437) to the volume of independent evidence implicating Russo at the time he confessed. Petitioner in *Vignera* (Br. p. 16) endorses this as one of the indicia of the "accusatory" stage.

We find the implications of this troublesome, for it leads to the consequence that good detective work and the accumulation of independent evidence will operate to shorten rather than lengthen the permissible period of "investigatory" interrogation. Ordinarily the police utilize interrogation to confront a suspect with evidence of his implication in the crime, both to see whether he can offer credible exculpatory explanation, and to stimulate admissions if no such explanation can be given. But under the "accusatory" test as applied in the *Russo* case, the police face the prospect that the greater the reason for interrogation of the suspect, the less will be their right to do so, unless counsel is brought into the picture.

We have considered the several proposals and the tests not so much to study their intrinsic merits and demerits,

as to demonstrate their variety and imprecision, and indicate the numerous questions they suggest but do not resolve. These matters are, we believe, highly relevant to the constitutional dimension of these cases, for they argue strongly against "freezing" the pre-arraignment scope of the right to counsel at a time when analysis of the problem is still in its infancy.

F. Importance of non-constitutional decisional sources

In this brief, we have urged that the scope of the right to the assistance of counsel prior to arraignment presents problems which are not ripe for constitutional disposition. In support of this viewpoint, we have sought to draw the Court's attention to a number of aspects of the problem, where, we believe, empirical evidence is insufficient for definitive rule-making, and to the uncertainties still surrounding the specific proposals that have been made to extend the right to counsel into the prearraignment stage.

We would like to close this portion of the brief on an affirmative note, by pointing out that the Constitution is by no means the only tool for the solution of problems of criminal procedure and that legislatures, state courts and professional organizations are currently concerned and actively engaged with pre-arraignment questions including the right to counsel. Nor is the field devoid of ideas and proposals alternative to those urged by petitioners in the present cases.

Public and professional concern with police interrogation centers chiefly on the possibility of abusive, oppressive practices, both physical or psychological, that subject the arrestee to pressures which violate the policy if not the letter of the Fifth Amendment privilege against self-incrimination. Furnishing counsel is one but only one of many means of ensuring that the suspect has an opportu-

nity to make a responsible choice as to whether or not to incriminate himself. There are a wide variety of alternative means by which this goal might be met, including rules barring the use of any confession made to the police; or made to the police during a delay in bringing a suspect before a magistrate; or made by a suspect who has not been warned of his right to remain silent; or made after the suspect has been denied a requested opportunity to consult family or friends or a lawyer; or shown by an evaluation of the "totality of the circumstances" to have been physically or psychologically coerced.

These rules obviously could be employed in combination. Indeed, it appears that the draftsmen of the American Law Institute's proposed Model Code of Criminal Procedure have contemplated an exclusionary rule based on a combination of requirements, including precise time limitations on the length of custody for pre-arraignment questioning; a requirement that a suspect be informed that he is under no obligation to talk; proscriptions against incommunicado detention and against other potentially coercive practices; and a prohibition of any questioning in the absence of counsel once detention has extended beyond a specified period of a few hours, except where there has been an explicit consent to such questioning. See Bator and Vorenberg, *supra*, at 71-76.

We do not suggest that any one of these alternatives is necessarily preferable to the others, or would protect the individual's privilege against compulsory self-incrimination better than would a rule requiring the state to furnish counsel at the stationhouse. We do suggest that the states should have an adequate opportunity to develop alternative methods. It may well be that experience will show that the alternatives provide adequate protection against police coercion, while having a significantly less damaging effect on the detection and prevention of crime.

The complex problems in the area of pre-arraignment procedure[1] are particularly appropriate for solution by legislation rather than by judicial decision. As Judge Kaufman stated in *United States* v. *Drummond*, —— F. 2d —— (2d Cir., Dec. 2, 1965, slip opinion pp. 3425, 3444):

> "... our Constitution guarantees fundamental rights, not the utterance of some judicially-ordained shibboleth. A decision based on constitutional fiat, therefore, is not a desirable method for reaching an informed resolution of the pre-trial access to counsel problem. This is precisely the sort of question that can best be answered after the investigative, experimental, and interest-balancing methods of the legislature are utilized."

A legislature is not limited by the facts of a particular case, and can deal constructively with the problems of police questioning in the context of the broad range of problems which exist in the pre-arraignment area. Questions of permissible police conduct during questioning of a suspect obviously bear a close relationship to standards for initial stopping, arrest, search, and subsequent detention. A legislature, working within a broader framework, can adjust the interrelated portions of the process without rejecting the ultimate goals sought by the proponents of an exclusionary rule based on the right to counsel. In addition, a legislature can be more specific than a court; the precise language of a statute may provide for more effective guidance than a judicially created rule formulated on the facts of particular cases.

Large-scale scholarly efforts—most significantly the American Bar Association's project on minimum stand-

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[1] Judge Friendly, remarking upon the complexity of this subject, has noted that the ALI's partial preliminary draft on pre-arraignment procedure spreads over fifty pages. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 930 (1965).

ards of criminal justice and the drafting of a Model Code of Pre-Arraignment Procedure by the American Law Institute—are underway, and may be expected to provide a basis for constructive action by state legislatures and courts. Even if the states did not all promptly adopt new statutory rules in light of the ALI Model Code, the Code —and its offshoots in the states that used it as a model— would provide valuable guidelines for courts faced with recurring problems in this area. See Friendly, *loc. cit. supra*, at 929.

We do not think the Court need be concerned that the state courts will rest content with old precedents, or ignore the demands of changing times and standards. As we have already noted, in other areas of criminal procedure the Court's new constitutional pronouncements followed state court decisions which, in fact, formed an important part of the basis for this Court's decisions.

The same progressive tendency is manifest among the state courts that have dealt extensively with problems pertaining to the right to counsel. For example, this Court's two most controversial recent decisions—i.e., the *Massiah* and *Escobedo* cases—had previously been anticipated in closely comparable decisions in New York State. In *People* v. *Di Biasi*, 7 N. Y. 2d 544 (1960), the New York Court of Appeals reversed a conviction because, as in the *Massiah* case (1964), the defendant made a statement (received in evidence at his trial) after indictment and in the absence of counsel.[1] In *People* v. *Donovan*, 13 N. Y. 2d 148 (1963), the court reached the same result where, as in *Escobedo* (1964), the defendant, prior to arraignment, had been denied access to his retained counsel.[2]

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[1] In *People* v. *Meyer*, 11 N. Y. 2d 162 (1962), the same rule was applied to a statement made after arraignment but before indictment.

[2] The *Donovan* case was cited with approval in the *Escobedo* case, 378 U. S. at 486-87.

Very recently, in *People* v. *Gunner*, 15 N. Y. 2d 226 (1965), the court extended pre-arraignment rights to counsel considerably beyond the holding of the *Escobedo* case. In the *Gunner* case, the defendant had made pre-arraignment statements to the police both before and after a lawyer had informed the police that he represented Gunner and wished that no more statements be taken. The conviction was reversed because the statements made after the lawyer's request were received at the trial; two members of the Court would have ruled the earlier statements likewise excludable, because the defendant had not been warned of his rights. See also *People* v. *Friedlander*, 16 N. Y. 2d 48 (1965).

If some other states have not yet had occasion to pursue the questions, or have reaffirmed more limited concepts of the right to counsel, that is still an insufficient reason for this Court to enlarge the constitutional requirements. The opportunity for constructive and varied development is one of the great values of the federal system. To let pass an opportunity such as presently exists for the development by the states of workable rules in this area of strong conflicting values would do great disservice to the principles of federalism and, we suggest, to the healthy development of criminal procedure in the United States.

II

New exclusionary rules limiting the admissibility of pre-arraignment statements should not be applied retroactively.

No. 762, *Johnson and Cassidy* v. *New Jersey*, is a proceeding for post-conviction relief in which petitioners contend that their pre-arraignment incriminatory statements, received in evidence against them at trial, were constitutionally inadmissible under the principles subsequently enunciated in the *Escobedo* case. The Supreme Court of New Jersey affirmed the denial of their applica-

tion, ruling that the *Escobedo* case established new rules of constitutional due process which should not be applied retroactively.[1]

In their brief (at pp. 32-34) in No. 762, the petitioners reject the conclusion below that *Escobedo* established new rules of constitutional law, and contend that the case therefore involves no problem of retroactivity. As *amici curiae*, we express no opinion on that question. Assuming, however, that this Court should agree with the New Jersey court's analysis of *Escobedo*, the problem of retroactivity must then be faced, as it also must in the event new exclusionary rules are to be established in the present or subsequent cases.

The Court has made it clear in two recent cases that not all new constitutional rules must be applied retroactively; rather the merits and demerits of retrospectivity must be weighed with respect to each case, by looking to the nature, purpose, and effect of the new rule, the reliance placed upon the previously existing rule, and the effect upon the administration of justice of a retroactive application of the new rule. *Linkletter* v. *Walker*, 381 U. S. 618, 628-29, 636 (1965); *Tehan* v. *Shott*, —— U. S. ——, 34 U.S.L. Week 4095, 4096 (Jan. 19, 1966). We submit that an examination of these considerations in the context of an exclusionary rule limiting the admissibility of pre-trial statements makes it amply clear that no such rule should be applied retroactively so as to vitiate a final conviction.

A. The state judicial systems and state law enforcement officials have justifiably placed great reliance on past decisions of this Court establishing voluntariness as the sole criterion for admissibility of a pre-arraignment statement.

There can be no doubt that over the course of years there has been extensive and justifiable reliance by the

[1] Other issues, unrelated to those discussed in this brief, are also raised by petitioners in No. 762.

state judicial systems upon this Court's decisions establishing voluntariness as the criterion for determining the admissibility of a pre-trial statement of an accused. Indeed, the Court had specifically held that the introduction of incriminating statements obtained in the absence of counsel—even after the defendant had clearly become the focus of a police investigation and had requested counsel—was no constitutional bar to a valid judgment where the statements were not involuntary. *Crooker* v. *California*, 357 U. S. 443 (1958); see also *Cicenia* v. *Lagay*, 357 U. S. 504 (1957); *Culombe* v. *Connecticut*, 367 U. S. 568, 588-602 (1961); *Brown* v. *Allen*, 344 U. S. 443, 474-476 (1953); *Stroble* v. *California*, 343 U. S. 181, 196-198 (1952); *Gallegos* v. *Nebraska*, 342 U. S. 55, 64-68 (1951).

As recently as 1963, the Court reiterated the well established rule that the admissibility of a pre-trial statement depended on its voluntariness, in a case where it held simply that the absence of a warning of a right to silence, delay in arraignment, and lack of opportunity to consult with counsel were factors involved in an assessment of voluntariness. *Haynes* v. *Washington*, 373 U. S. 503, 510-511 (1963). For this Court now to apply a new exclusionary rule retroactively, without regard to the voluntariness of challenged statements, would be to hold that the state courts should not have admitted evidence which this Court had plainly told them was admissible. *Cf. Linkletter* v. *Walker*, *supra* at 637; *Tehan* v. *Shott*, *supra* at 4096-4098.

The reliance of the police and prosecutors is also significant. A District Attorney naturally prepares his case on the basis of what this Court tells him is the applicable law. At least prior to the decision in *Escobedo*, the only federal constitutional bar to the admissibility of a defendant's pre-arraignment statement was involuntariness—if his statement was voluntary, it was admissible. The police, too, must have relied upon the many decisions holding that the relevant criterion was voluntariness. Certainly they

of the *Mapp* exclusionary rule. What is perhaps even more significant is the fact that such statements, or their fruits, are most apt to have been used in prosecutions for violent, frequently unwitnessed crimes, such as murder, manslaughter, rape, kidnapping and robbery. The individuals convicted of these crimes are the ones who would be most likely to reap the benefits of retroactive application of a new rule in this area.[1]

The pre-trial statements of the defendants were introduced at the trials of 85 of the last 100 persons executed in New York State prior to 1962.[2] It is certainly reasonable to suppose that a similarly high percentage of incriminatory statements was introduced at other trials for serious crimes. Few indeed are the cases in which such statements were made in the presence of counsel or after consultation with counsel. The persons who had been convicted at trials at which such statements were used would, by hypothesis, receive the benefit of retroactive application regardless of the fact that they were convicted fairly under the law as it stood at the time of the trial, despite the reliability of the adjudication of guilt, and irrespective of the voluntariness of their statements.

Application of any new exclusionary rule to convictions which became final prior to the change in the law would, of course, afford significant advantages to the convicted

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[1] Some idea of the impact upon old convictions of these serious crimes may be gained from the statistics presented to this Court last year by the New York Attorney General and the National District Attorneys Association in connection with the cases involving the retroactivity of the *Mapp* exclusionary rule. See text at p. 25, *supra*. As of June 30, 1964, some 13,869 persons were imprisoned in New York for felony convictions; of these, 4,543 were imprisoned pursuant to convictions had prior to January 1, 1961. Over 50% of those imprisoned for over 3½ years—2,607 of the total, of 4,543—had been convicted of murder, manslaughter, kidnapping, rape or robbery. See Supplementary Memorandum on Behalf of Respondents in *Linkletter* v. *Walker* (No. 95, Oct. Term 1965) and *Angelet* v. *Fay* (No. 578, Oct. Term 1965) at page 4.

[2] Supplementary Memorandum (*supra*, n. 1) at pp. 8-14.

individual who sought to take advantage of the new rule via an application for post-conviction relief. Both on collateral attack and, if that succeeded, upon retrial of the case, the passage of time—with the consequent dimming of memories, death or departure of witnesses, and loss of relevant records—would inevitably work to the accused's advantage. See, *e.g.*, *Tehan* v. *Shott*, *supra* at 4099; *Linkletter* v. *Walker*, *supra* at 637-638; *United States ex rel. Angelet* v. *Fay*, 381 U. S. 65 (1965); *United States* v. *Sobell*, 314 F. 2d 314, 325 (2d Cir.), cert. denied 374 U. S. 857 (1963); Bator, *Finality in the Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 478 (1963). As Judge *Friendly* observed in writing for a unanimous Court in the *Sobell* case, *supra* at 325:

> "collateral attack can come at any time. Yet normally it is quite academic to talk of a new trial ten or fifteen years after the event; in most cases to direct one after such an interval is in practical result to order a release from further punishment, although the defendant does not even contend that he is entitled to that relief from the courts."

(2) *Retroactive application of a new rule would impair the future development of progressive solutions to the difficult problems of criminal procedure*

The recent decisions of this Court with respect to the admissibility of pre-trial statements made in the absence of counsel have been founded substantially on the prior development of similar rules by the state courts, particularly the New York Court of Appeals. See *Massiah* v. *United States*, 377 U. S. 201 at 204-205 (1964) and *Escobedo* v. *Illinois*, 378 U. S. 478 at 486-487 (1964).[1]

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[1] The *Massiah* decision noted some 10 New York decisions, most notably *People* v. *Waterman*, 9 N. Y. 2d 561 (1961); *People* v.

(Footnote continued on following page)

It seems certain, however, that one reason why the state courts have exercised their powers broadly in establishing new exclusionary rules is because of their expectation that the newly enunciated rules would affect relatively few past cases—indeed, only those in which the direct appellate process had not yet been exhausted. The New York Court of Appeals, for example, has declined to apply its new rules retroactively.[1] See *People* v. *Howard*, 12 N. Y. 2d 65 (1962), *cert. denied* 374 U. S. 840 (1963); *People* v. *Dash*, 16 N. Y. 2d 493 (1965). Similarly, the California Supreme Court, one of the few state courts which has interpreted the *Escobedo* decision as requiring a warning of a right to consult counsel and to have counsel provided, even in the absence of a request, has declined to apply its new rule retroactively. Compare *People* v. *Dorado*, 42 Cal. Reptr. 169, 398 P. 2d 361 (1965) with *In re Lopez*, 42 Cal. Reptr. 188, 398 P. 2d 380 (1965).

Significantly, the progressive New York rules were all developed in cases where appropriate and timely objections were made at trial to the use of the statement in question. If collateral attack were to be made broadly

(Footnote continued from preceding page)

Rodriguez, 11 N. Y. 2d 279 (1962); *People* v. *Meyer*, 11 N. Y. 2d 162 (1962); and *People* v. *DiBiasi*, 7 N. Y. 2d 544 (1960). The *Escobedo* opinion relied on *People* v. *Donovan*, 13 N. Y. 2d 148 (1963). This Court has also relied heavily on state court decisions in developing the exclusionary rule barring the use at trial of illegally seized evidence. See *Mapp* v. *Ohio*, 367 U. S. 643 at 651-653 (1963).

[1] Significantly, New York has long allowed post-conviction relief for a claim that a conviction was obtained in the absence of counsel. See, *e.g.*, *Matter of Bojinoff* v. *People*, 299 N. Y. 145 (1949). The New York courts thus recognize the great distinction which exists between the case where a defendant has been deprived of the assistance of counsel at trial and the case where a defendant who has had the assistance of counsel at trial later seeks to take advantage of a change in the rules governing the admissibility of evidence. Even though the change may have enlarged the right to counsel at a pre-trial stage, the New York courts will not permit collateral attack in the latter case.

available for claims based on a new exclusionary rule in the confession area, it is to be expected that concepts of trial strategy would be adjusted accordingly. Surely the incentive of defense counsel to challenge an existing rule of law in a developing area would be lessened—a different course could be pursued at trial and, as in the *Johnson* case now before the Court (No. 762), a constitutional challenge could later be made on collateral attack.

Both the lessened likelihood of challenge to existing rules and the spectre of further retroactive effects could be expected to inhibit state appellate courts—and perhaps also the federal courts, which would be flooded with applications from federal prisoners (28 U.S.C. § 2255) and state prisoners (28 U.S.C. § 2241)—from engaging in future constructive decision-making in the area of criminal procedure.

(3) Retroactivity of a new exclusionary rule would impair the ability of the state judicial legal systems to provide post-conviction relief for those individuals whose present incarceration truly amounts to "intolerable restraint"

It would certainly seem that under established principles of comity and exhaustion of state remedies, the state courts would be given the first opportunity to consider a claim for post-conviction relief which is based upon a new exclusionary rule. *Cf.* 28 U.S.C. § 2254; *Case* v. *Nebraska*, 381 U. S. 336 (1965). Clearly, however, the retroactive application of a new exclusionary rule would impose tremendous strains upon the bench and bar in all of the states —very possibly to the detriment of the individuals whose claims for post-conviction relief are more deserving under established principles of criminal justice.

The kinds of claims which have historically been recognized as warranting post-conviction relief are those which go to the fairness of the trial process itself, and which

raise genuine doubt as to the reliability of the adjudication of guilt.[1] The absence of counsel at trial (*Gideon* v. *Wainwright*, 372 U. S. 335 [1963]); the denial of opportunity to appeal (*Griffin* v. *California*, 351 U. S. 12 [1956]; *Eskridge* v. *Washington*, 357 U. S. 214 [1958]; *Douglas* v. *California*, 372 U. S. 356 [1963]); the use of an involuntary confession (*Reck* v. *Pate*, 367 U. S. 443 [1961]; *Fay* v. *Noia*, 372 U. S. 391 [1963]); the use of an unfair and unreliable procedure for testing voluntariness (*Jackson* v. *Denno*, 378 U. S. 368 [1964]); the knowing use of perjured testimony (*Mooney* v. *Holohan*, 294 U. S. 103 [1935]); and trial under conditions of mob domination or inflammatory publicity (*Moore* v. *Dempsey*, 261 U. S. 86 [1923]; *Irwin* v. *Dowd*, 359 U. S. 394 [1959]), fall into this category. These are the kinds of cases in which it can truly be said that continued imprisonment is intolerable (*cf. Fay* v. *Noia*, *supra* at 401-02, 441); where a defendant has really been afforded "no process of law".[2] These are the cases in which the judgment was, in effect, void *ab initio*, and thus subject to attack on federal habeas corpus just as any void judgment is always open to collateral attack. See *Fay* v. *Noia*, *supra*, at 423.

These are the kinds of cases for which many of the states have in the past sought to provide post-conviction relief—and for which, where previous remedies have proven too narrow, the states are now in the process of broadening the remedies under the impetus of the *Noia* decisions. These are the meritorious cases—the ones in which a hearing may well be warranted in order to de-

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[1] See Brief for Respondent in *Angelet* v. *Fay*, No. 578, Oct. Term 1964, pp. 18-20, 32-36; *cf.* Mishkin, *The High Court, The Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56 (1965); *Linkletter* v. *Walker*, *supra*, at 636 n. 20.

[2] Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 455-460 (1963). See also Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 Duke L. J. 319, 340-341.

termine both the truth of the charges and the desirability of overlooking a prior failure to raise serious issues of both trial fairness and of reliability—upon which the states should be able to concentrate their resources. Indeed, that is clearly the purpose of the new statutes and court rules which have come into being since the *Noia* decision.[1] To require the states to afford collateral relief in a case where, by contrast, there is no doubt as to the factual reliability of a defendant's statement, where the statement was used at a trial at which the defendant had adequate counsel and at which existing law permitted its use, would be to establish an entirely new and unnecessary concept of collateral relief.

The result, inevitably, would be unending litigation by convicted prisoners, and a wholly unwarranted drain on legal resources—the time of judges, lawyers, court personnel and policemen, as well as public funds—at a time when these resources can be far more beneficially allocated to present responsibilities and to the pursuit of constructive legal developments in other areas of the criminal law.

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[1] Recent state statutes, court rules and judicial decisions are collected in the concurring opinion of Mr. Justice Brennan in *Case v. Nebraska*, 381 U. S. 336 (1965) at 340, 345-346, n. 8. See also Resolution XIV, *Post-Conviction Remedies*, adopted without opposition at the 59th Annual Meeting of the National Association of Attorneys Generals, held July 25-30, 1965. The resolution urges all states which have not yet done so "to adopt, either by statute or rule of court, post-conviction procedures which make it possible to adjudicate all claims of constitutional right properly presented by persons convicted in state court criminal proceedings."

CONCLUSION

For all the foregoing reasons we respectfully submit that the Court, in disposing of these cases, should observe the limiting principles of constitutional review which we have endeavored to set forth.

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Respectfully submitted,

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We dealt with certain phases of this problem recently in *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). There, as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said "I didn't shoot Manuel, you did it," they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him. We held that the statements thus made were constitutionally inadmissible.

This case has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago. Both state and federal courts, in assessing its implications, have arrived at varying conclusions.[1] A wealth of scholarly material has been written tracing its ramifications and underpinnings.[2] Police and prose-

[1] Compare *United States* v. *Childress*, 347 F. 2d 448 (C. A. 7th Cir. 1965) with *Collins* v. *Beto*, 348 F. 2d 823 (C. A. 5th Cir. 1965). Compare *People* v. *Dorado*, 62 Cal. 2d 350, 398 P. 2d 361, 42 Cal. Rptr. 169 (1964) with *People* v. *Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964).

[2] See, *e. g.*, Enker and Elsen, Counsel for the Suspect: *Massiah* v. *United States* and *Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47 (1964); Herman, The Supreme Court and Restrictions on Police Interrogations, 25 Ohio St. L. J. 449 (1964); Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time (1965); Dowling, Escobedo and

cutor have speculated on its range and desirability.[3] We granted certiorari in these cases, 382 U. S. 924, 925, 937, in order further to explore some facets of the problems, thus exposed, of applying the privilege against self-incrimination to in-custody interrogation, and to give

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Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure, 56 J. Crim. L., C. & P. S. 156 (1965).

The complex problems also prompted discussions by jurists. Compare Bazelon, Law, Morality and Civil Liberties, 12 U. C. L. A. L. Rev. 13 (1964), with Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929 (1965).

[3] For example, the Los Angeles Police Chief stated that "If the police are required . . . to . . . establish that the defendant was apprised of his constitutional guarantees of silence and legal counsel prior to the uttering of any admission or confession, and that he intelligently waived these guarantees . . . a whole Pandora's box is opened as to under what circumstances . . . can a defendant intelligently waive these rights. . . . Allegations that modern criminal investigation can compensate for the lack of a confession or admission in every criminal case is totally absurd!" Parker, 40 L. A. Bar. Bull. 603, 607, 642 (1965). His prosecutorial counterpart, District Attorney Younger, stated that "[I]t begins to appear that many of these seemingly restrictive decisions are going to contribute directly to a more effective, efficient and professional level of law enforcement." L. A. Times, Oct. 2, 1965, p. 1. The former Police Commissioner of New York, Michael J. Murphy, stated of *Escobedo:* "What the Court is doing is akin to requiring one boxer to fight by Marquis of Queensbury rules while permitting the other to butt, gouge and bite." N. Y. Times, May 14, 1965, p. 39. The former United States Attorney for the District of Columbia, David C. Acheson, who is presently Special Assistant to the Secretary of the Treasury (for Enforcement), and directly in charge of the Secret Service and the Bureau of Narcotics, observed that "Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain." Quoted in Herman, *supra*, n. 2, at 500, n. 270. Other views on the subject in general are collected in Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, 52 J. Crim. L., C. & P. S., 21 (1961).

concrete constitutional guidelines for law enforcement agencies and courts to follow.

We start here, as we did in *Escobedo*, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the *Escobedo* decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that "No person . . . shall be compelled in any criminal case to be a witness against himself," and that "the accused shall . . . have the Assistance of Counsel"—rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured "for ages to come and . . . designed to approach immortality as nearly as human institutions can approach it," *Cohens* v. *Virginia*, 6 Wheat. 264, 387 (1821).

Over 70 years ago, our predecessors on this Court eloquently stated:

> "The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the

questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evidenced in many of these earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the inequities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." *Brown* v. *Walker*, 161 U. S. 591, 596–597 (1896).

In stating the obligation of the judiciary to apply these constitutional rights, this Court declared in *Weems* v. *United States*, 217 U. S. 349, 373 (1910):

". . . our contemplation cannot be only what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The

meaning and vitality of the Constitution have developed against narrow and restrictive construction."

This was the spirit in which we delineated, in meaningful language, the manner in which the constitutional rights of the individual could be enforced against overzealous police practices. It was necessary in *Escobedo*, as here, to insure that what was proclaimed in the Constitution had not become but a "form of words," *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920), in the hands of government officials. And it is in this spirit, consistent with our role as judges, that we adhere to the principles of *Escobedo* today.

Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.[4] As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the

[4] This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused.

process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

I.

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody and deprived of his freedom of action. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930's, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the "third degree" flourished at that time.[5]

[5] See, for example, IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931)

In a series of cases decided by this Court long after these studies, the police resorted to physical brutality—beatings, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions.[6] The 1961 Commission on Civil Rights found much evidence to indicate that "some policemen still resort to physical force to obtain confessions," 1961 Comm'n on Civil Rights Rep., Justice, pt. 5, 17. The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party. *People* v. *Portelli*, 15 N. Y. 2d 235, 205 N. E. 2d 857, 257 N. Y. S. 2d 931 (1965).[7]

[Wickersham Report]; Booth, Confessions and Methods Employed in Procuring Them, 4 So. Calif. L. Rev. 83 (1930); Kauper, Judicial Examination of the Accused—A Remedy for the Third Degree, 30 Mich L. Rev. 1224 (1932). It is significant that instances of third-degree treatment of prisoners almost invariably took place during the period between arrest and preliminary examination. Wickersham Report, at 169; Hall, The Law of Arrest in Relation to Contemporary Social Problems, 3 U. Chi. L. Rev. 345, 357 (1936). See also Foote, Law and Police Practice: Safeguards in the Law of Arrest, 52 Nw. U. L. Rev. 16 (1957).

[6] *Brown* v. *Mississippi*, 297 U. S. 278 (1936); *Chambers* v. *Florida*, 309 U. S. 227 (1940); *Canty* v. *Alabama*, 309 U. S. 629 (1940); *White* v. *Texas*, 310 U. S. 530 (1940); *Vernon* v. *Alabama*, 313 U. S. 547 (1941); *Ward* v. *Texas*, 316 U. S. 547 (1942); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Malinski* v. *New York*, 324 U. S. 401 (1945); *Leyra* v. *Denno*, 347 U. S. 556 (1954). See also *Williams* v. *United States*, 341 U. S. 97 (1951).

[7] In addition, see *People* v. *Wakat*, 415 Ill. 610, 114 N. E. 2d 706 (1953); *Wakat* v. *Harlib*, 253 F. 2d 59 (C. A. 7th Cir. 1958) (defendant suffering from broken bones, multiple bruises and injuries sufficiently serious to require eight months' medical treatment after being manhandled by five policemen); *Kier* v. *State*, 213 Md. 556, 132 A. 2d 494 (1957) (police doctor told accused, who was

The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future. The conclusion of the Wickersham Commission Report, made over 30 years ago, is still pertinent:

> "To the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the present Lord Chancellor of England (Lord Sankey): 'It is not admissible to do a great right by doing a little wrong. . . . It is not sufficient to do justice by obtaining a proper result by irregular or improper means.' Not only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. As the New York prosecutor quoted in the report said, 'It is a short cut and makes the police lazy and unenterprising.' Or, as another official quoted remarked: 'If you use your fists, you

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strapped to a chair completely nude, that he proposed to take hair and skin scrapings from anything that looked like blood or sperm from various parts of his body); *Bruner* v. *People*, 113 Col. 194, 156 P. 2d 111 (1945) (defendant held in custody over two months, deprived of food for 15 hours, forced to submit to a lie detector test when he wanted to go to the toilet); *People* v. *Matlock*, 51 Cal. 2d 682, 336 P. 2d 505 (1959) (defendant questioned incessantly over an evening's time, made to lie on cold board and to answer questions whenever it appeared he was getting sleepy). Other cases are documented in American Civil Liberties Union, Illinois Division, Secret Detention by the Chicago Police (1959); Pott, The Preliminary Examination and "The Third Degree," 2 Baylor L. Rev. 131 (1950); Sterling, Police Interrogation and the Psychology of Confession, 14 J. Pub. L. 25 (1965).

> are not so likely to use your wits.' We agree with the conclusion expressed in the report, that 'The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public.'" IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931), 5.

Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, "Since *Chambers* v. *Florida*, 309 U. S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960). Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics.[8] These

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[8] The manuals quoted in the text following are the most recent and representative of the texts currently available. Material of the same nature appears in Kidd, Police Interrogation (1940); Mulbar, Interrogation (1951); Dienstein, Technics for the Crime Investigator (1952), 97–115. Studies concerning the observed practices of the police appear in LaFave, Arrest: The Decision To Take a Suspect Into Custody (1965), 244–437, 490–521; LaFave, Detention for Investigation by the Police: An Analysis of Current Practices, 1962 Wash. U. L. Q. 331; Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Calif L. Rev. 11 (1962); Sterling, *supra*, n. 7, at 47–65.

texts are used by law enforcement agencies themselves as guides.[9] It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering these texts and other data, it is possible to describe procedures observed and noted around the country.

The officers are told by the manuals that the "principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation." [10] The efficacy of this tactic has been explained as follows:

> "If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and

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[9] The methods described in Inbau and Reid, Criminal Interrogation and Confessions (1962), are a revision and enlargement of material presented in three prior editions of a predecessor text, Lie Detection and Criminal Interrogation (3d ed. 1953). The authors and their associates are officers of the Chicago Police Scientific Crime Detection Laboratory and have had extensive experience in writing, lecturing and speaking to law enforcement authorities over a 20-year period. They say that the techniques portrayed in their manuals reflect their experiences and are the most effective psychological stratagems to employ during interrogations. Similarly, the techniques described in O'Hara, Fundamentals of Criminal Investigation (1959), were gleaned from long service as observer, lecturer in police science, and work as a federal criminal investigator. All these texts have had rather extensive use among law enforcement agencies and among students of police science, with total sales and circulation of over 44,000.

[10] Inbau and Reid, *supra*, at 1.

presses the subject with the apparent fairness of his interrogator." [20] After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect's refusal to talk:

> "Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O. K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over." [21]

Few will persist in their initial refusals to talk, it is said, if this monologue is employed correctly.

In the event that the subject wishes to speak to a relative or an attorney, the following advice is tendered:

> "[T]he interrogator should respond by suggesting the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter. If the request is for an attorney, the interrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, 'Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself.' " [22]

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[20] Inbau and Reid, *supra*, at 111.

[21] *Ibid.*

[22] Inbau and Reid, *supra*, at 112.

From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired object may be obtained." [23] When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.[24]

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[23] Inbau and Reid, Lie Detection and Criminal Interrogation (3d ed. 1953), 185.

[24] Interrogation procedures may even give rise to a false confession. The most recent conspicuous example occurred in New York, in 1964, when a Negro of limited intelligence confessed to two brutal murders and a rape which he had not committed. When this was discovered, the prosecutor was reported as saying: "Call it what you want—brain-washing, hypnosis, fright. They made him give an untrue confession. The only thing I don't believe is that Whitmore was beaten." N. Y. Times, Jan. 28, 1965, p. 1, col. 5. In two other instances, similar events had occurred. N. Y. Times, Oct. 20, 1964, p. 22, col. 1; N. Y. Times, Aug. 24, 1965, p. 1, col. 1. In general, see Borchard, Convicting the Innocent (1932); Frank and Frank, Not Guilty (1957).

This fact may be illustrated simply by referring to three confession cases decided by this Court in the Term immediately preceding our *Escobedo* decision. In *Townsend* v. *Sain*, 372 U. S. 293 (1963), the defendant was a 19-year-old heroin addict, described as a "near mental defective," *id.*, at 307–310. The defendant in *Lynumn* v. *Illinois*, 372 U. S. 528 (1963), was a woman who confessed to the arresting officer after being importuned to "cooperate" in order to prevent her children from being taken by relief authorities. This Court similarly reversed the conviction of a defendant in *Haynes* v. *Washington*, 373 U. S. 503 (1963), whose persistent request during his interrogation was to phone his wife or attorney.[25] In other settings, these individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed.

In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring. In No. 759, *Miranda* v. *Arizona*, the police arrested the defendant and took him to a special interrogation room where they secured a confession. In No. 760, *Vignera* v. *New York*, the defendant made oral admissions to the police after interrogation in the afternoon, and then signed an inculpatory statement upon being questioned by an assistant district attorney later the same evening. In No. 761, *Westover* v. *United States*, the defendant was

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[25] In the fourth confession case decided by the Court in the 1963 Term, *Fay* v. *Noia*, 372 U. S. 391 (1963), our disposition made it unnecessary to delve at length into the facts. The facts of the defendant's case there, however, paralleled those of his co-defendants, whose confessions were found to have resulted from continuous and coercive interrogation for 27 hours, with denial of requests for friends or attorney. See *United States* v. *Murphy*, 222 F. 2d 698 (C. A. 2d Cir., 1955) (Frank, J.); *People* v. *Bonino*, 1 N. Y. 2d 752, 135 N. E. 2d 51 (1956).

handed over to the Federal Bureau of Investigation by local authorities after they had detained and interrogated him for a lengthy period, both at night and the following morning. After some two hours of questioning, the federal officers had obtained signed statements from the defendant. Lastly, in No. 584, *California* v. *Stewart*, the local police held the defendant five days in the station and interrogated him on nine separate occasions before they secured his inculpatory statement.

In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in *Miranda*, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in *Stewart*, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade. To be sure, the records do not evince overt physical coercion or patented psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.[35] The current practice of incom-

[35] The absurdity of denying that a confession obtained under these circumstances is compelled is aptly portrayed by an example in Pro-

municado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.

II.

We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times.[27] Per-

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fessor Sutherland's recent article, Crime and Confession, 79 Harv. L. Rev. 21, 37 (1965):

"Suppose a well-to-do testatrix says she intends to will her property to Elizabeth. John and James want her to bequeath it to them instead. They capture the testatrix, put her in a carefully designed room, out of touch with everyone but themselves and their convenient 'witnesses,' keep her secluded there for hours while they make insistent demands, weary her with contradictions and finally induce her to execute the will in their favor. Assume that John and James are deeply and correctly convinced that Elizabeth is unworthy and will make base use of the property if she gets her hands on it, whereas John and James have the noblest and most righteous intentions. Would any judge of probate accept the will so procured as the 'voluntary' act of the testatrix?"

[27] Thirteenth century commentators found an analogue to the privilege grounded in the Bible. "To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree." Maimonides, Mishneh Torah (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, ¶ 6, 3 Yale Judaica Series 52–53. See also Lamm, The Fifth Amendment and Its Equivalent in the Halakha, 5 Judaism 53 (Winter 1956).

haps the critical historical event shedding light on its origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to take the Star Chamber Oath in 1637. The oath would have bound him to answer to all questions posed to him on any subject. The Trial of John Lilburn and John Wharton, 3 How. St. Tr. 1315 (1637–1645). He resisted the oath and declaimed the proceedings, stating:

> "Another fundamental right I then contended for, was, that no man's conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so." Heller and Davies, The Leveller Tracts 1647–1653 (1944), 454.

On account of the Lilburn Trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation. The lofty principles to which Lilburn had appealed during his trial gained popular acceptance in England.[28] These sentiments worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights.[29] Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." *Boyd* v. *United States*, 116 U. S. 616, 635 (1886). The privilege was elevated to constitutional status and has always been "as broad as the mischief

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[28] See Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 9–11 (1949); 8 Wigmore, Evidence (McNaughton rev., 1961), 289–295. See also Lowell, The Judicial Use of Torture, 11 Harv. L. Rev. 220, 290 (1897).

[29] See Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Va. L. Rev. 763 (1935); *Ullmann* v. *United States*, 350 U. S. 422, 445–449 (1956) (Douglas, J., dissenting).

against which it seeks to guard." *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892). We cannot depart from this noble heritage.

Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often transcends its origins," the privilege has come rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." *United States* v. *Grunewald*, 233 F. 2d 556, 579, 581–582 (Frank, J., dissenting), rev'd, 353 U. S. 391 (1957). We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values, *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55–57, n. 5 (1964); *Tehan* v. *Shott*, 382 U. S. 406, 414–415, n. 12 (1966). All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev., 1961), 317, to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. *Chambers* v. *Florida*, 309 U. S. 227, 235–238 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964).

The question in these cases is whether the privilege is fully applicable during a period of custodial interroga-

tion. In this Court, the privilege has consistently been accorded a liberal construction. *Albertson* v. *SACB*, 382 U. S. 70, 81 (1965); *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951); *Arndstein* v. *McCarthy*, 254 U. S. 71, 72–73 (1920); *Counselman* v. *Hitchock*, 142 U. S. 547, 562 (1892). We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.[80]

This question, in fact, could have been taken as settled in federal courts almost 70 years ago, when, in *Bram* v. *United States*, 168 U. S. 532, 542 (1897), this Court held:

> "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"

In *Bram*, the Court reviewed the British and American history and case law and set down the Fifth Amendment standard for compulsion which we implement today:

> "Much of the confusion which has resulted from the effort to deduce from the adjudged cases what

[80] Compare *Brown* v. *Walker*, 161 U. S. 596 (1896); *Quinn* v. *United States*, 349 U. S. 155 (1955).

would be a sufficient quantum of proof to show that a confession was or was not voluntary, has arisen from a misconception of the subject to which the proof must address itself. The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent . . . ." 168 U. S., at 549. And see, *id.*, at 542.

The Court has adhered to this reasoning. In 1924, Mr. Justice Brandeis wrote for a unanimous Court in reversing a conviction resting on a compelled confession, *Wan* v. *United States*, 266 U. S. 1. He stated:

> "In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise. *Bram* v. *United States*, 168 U. S. 532." 266 U. S., at 14–15.

In addition to the expansive historical development of the privilege and the sound policies which have nurtured

its evolution, judicial precedent thus clearly establishes its application to incommunicado interrogation. In fact, the Government concedes this point as well established in No. 761, *Westover* v. *United States*, stating: "We have no doubt . . . that it is possible for a suspect's Fifth Amendment right to be violated during in-custody questioning by a law-enforcement officer." [31]

Because of the adoption by Congress of Rule 5 (a) of the Federal Rules of Criminal Procedure, and this Court's effectuation of that Rule in *McNabb* v. *United States*, 318 U. S. 332 (1943), and *Mallory* v. *United States*, 354 U. S. 449 (1957), we have had little occasion in the past quarter century to reach the constitutional issues in dealing with federal interrogations. These supervisory rules, requiring production of an arrested person before a commissioner "without unnecessary delay" and excluding evidence obtained in default of that statutory obligation, were nonetheless responsive to the same considerations of Fifth Amendment policy that unavoidably face us now as to the States. In *McNabb*, 318 U. S., at 343–344, and in *Mallory*, 354 U. S., at 455–456, we recognized both the dangers of interrogation and the appropriateness of prophylaxis stemming from the very fact of interrogation itself.[32]

Our decision in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), necessitates an examination of the scope of the privilege in state cases as well. In *Malloy*, we squarely held the

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[31] Brief for the United States, p. 28. To the same effect, see Brief for the United States, pp. 40–49, n. 44, *Anderson* v. *United States*, 318 U. S. 350 (1943); Brief for the United States, pp. 17–18, *McNabb* v. *United States*, 318 U. S. 332 (1943).

[32] Our decision today does not indicate in any manner, of course, that these rules can be disregarded. When federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder. See generally, Hogan and Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L. J. 1 (1958).